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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JUSSI K. KIVISTO
Petitioner, pro se

v.

GMAC, LLC, F/K/A GENERAL MOTORS ACCEPTANCE CORPORATION
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question raised by this petition for certiorari is whether under the Fourteenth Amendment to the United States Constitution damages are immediately awardable under § 78.20 Fla. Stat. (2007), as applied, upon the dissolving of a wrongfully issued prejudgment writ of replevin under § 78.068(6) Fla. Stat. (2007).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jussi K. Kivisto, respectfully submits this petition for writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is not published. (App., *infra*, 1a) The Opinion of the Fourth District Court of Appeal is reported at 978 So. 2d 283 (4th DCA 2008) (App., *infra*, 2a-3a)

JURISDICTION

The Supreme Court of Florida entered judgment on October 14, 2008. On January 3, 2009 Justice Thomas granted Application (08A567) extending time to file a petition for certiorari up to and including March 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: No State shall . . . deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV, § 1.

§ 78.068 Fla. Stat. (2007) provides:

78.068 Prejudgment writ of replevin.–

(1) A prejudgment writ of replevin may be issued and the property seized delivered forthwith to the petitioners when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the verified petition or by separate affidavit of the petitioner.

(2) This prejudgment writ of replevin may issue if the court finds, pursuant to subsection (1), that the defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser during the pendency of the action or that the defendant has failed to make payment as agreed.

(3) The petitioner must post bond in the amount of twice the value of the goods subject to the writ or twice the balance remaining due and owing, whichever is lesser as determined by the court, as security for the payment of damages the defendant may sustain when the writ is obtained wrongfully.

(4) The defendant may obtain release of the property seized under a prejudgment writ of replevin by posting bond within 5 days after serving of the writ in the amount of $1^1/_4$ the amount due and owing on the agreement for the satisfaction of any judgment which may be rendered against the defendant.

(5) A prejudgment writ of replevin shall issue only upon the signed order of a circuit court judge or a county court judge.

(6) The defendant, by contradictory motion filed with the court within 10 days after service of the writ, may obtain the dissolution of a prejudgment writ of replevin unless the petitioner proves the grounds upon which the writ was issued. The court shall set down such motion for an immediate hearing. This motion shall be in lieu of the provisions of subsection (4).

§ 78.20 Fla. Stat. (2007) provides:

78.20 Judgment for defendant when goods retained by, or redelivered to, defendant.—

When property has been retained by, or redelivered to, defendant on his or her forthcoming bond or upon the dissolution of a prejudgment writ and defendant prevails, he or she shall have judgment against plaintiff for his or her damages for the taking, if any, of the property, attorney fees, and costs. The remedies provided in this section and s. 78.21 shall not preclude any other remedies available under the laws of this state.

STATEMENT

On January 26, 2003 Petitioner executed an automobile lease which lease was scheduled to mature on January 25, 2007. On December 27, 2006 Petitioner exercised his option to purchase the vehicle at maturity. (App., *infra*, 4a-6a)

In spite of Petitioner's repeated faxes, e-mails, and telephone calls Petitioner received no response from Respondent to his letter of 12/27/06 exercising the purchase option.

On May 2, 2007 Respondent, without warning, notice, or service filed Complaint of Prejudgment Writ of Replevin against Petitioner; on June 26, 2007, without warning or notice, Respondent, armed with a prejudgment writ of replevin issued *ex parte* by the trial court, had the sheriff seize the vehicle from Petitioner's driveway in a gated community in Boca Raton, Florida. On July 6, 2007 Petitioner filed his Motion to Dissolve Prejudgment Writ of Replevin. (App., *infra*, 7a-15a)

On August 3, 2007, the trial court dissolved the prejudgment writ of replevin and ordered the Respondent to return and surrender the vehicle to Petitioner.

The order granting the motion to dissolve the prejudgment writ had the effect of determining that Respondent's seizure of the vehicle pursuant to the prejudgment writ of replevin was wrongful and entitling Petitioner to damages from Respondent and the Surety.

On August 22, 2007 after Petitioner filed a Motion for Contempt Respondent finally surrendered the vehicle to Petitioner.

Petitioner then filed a Motion for Damages seeking damages that he had sustained as a result of the wrongfully issued prejudgment writ of replevin. (App., *infra*, 16a-18a) The trial court ruled that Petitioner was not immediately entitled to damages under § 78.20 Fla. Stat. (2007) upon the dissolving of the wrongfully issued writ of prejudgment replevin under § 78.068(6) Fla. Stat. (2007); but, an award of damages had to be postponed until Petitioner prevailed, if at all, in the main replevin action.

Petitioner filed a petition for certiorari with the Florida Fourth District Court of Appeal (the "4th DCA") arguing that under *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974), as interpreted by *McMurrain v. Fason*, 584 So.2d 1027 (Fla. 1st DCA 1991) *rev. denied*, 592 So.2d 680 (Fla. 1991), the trial court's ruling that Petitioner was not immediately entitled to damages under § 78.20 Fla. Stat. (2007) upon the dissolving of the wrongfully issued writ of prejudgment replevin violated the due process clause of the Fourteenth Amendment. (App., *infra*, 19a-28a)

The 4th DCA denied the petition (App., *infra*, 2a-3a) certifying direct conflict with *McMurrain v. Fason*, 584 So.2d 1027 (Fla. 1st DCA 1991) stating:

> In *McMurrain v. Fason*, 584 So. 2d 1027 (Fla. 1st DCA 1991), the first district granted a petition for certiorari under similar circumstances, holding that the damages were due immediately upon the dissolving of the writ. Prior to *McMurrain*, this court had construed section 78.20, Florida Statutes (2007), upon which this issue turns, in a manner contrary to *McMurrain*. *Gimbel v. Int'l Mailing and Printing Co*, 506 So.2d 1081 (Fla. 4th DCA 1987).

> After McMurrain was decided the fifth district, in Trans *Atlantic Distributors, L.P. v. Whiland Co., S.A.* 671 So.2d 883 (Fla. 5th DCA 1996) adopted our holding in *Gimbel* and disagreed with McMurrain.
>
> We agree that this order is reviewable by certiorari, based upon *McMurrain,* but we disagree with the holding on the merits on *McMurrain* and agree with *Trans Atlantic.* We certify direct conflict with *McMurrain v. Fason,* 584 So.2d 1027 (Fla. 1st DCA 1991).

In *Trans Atlantic Distributors v. Whiland,* 671 So.2d 883, 884 (Fla. 5th DCA 1996) the Florida Fifth District held:

> In agreeing with the Fourth District's interpretation of section 78.20, we acknowledge conflict with *McMurrain v. Fason,* 584 So.2d 1027 (Fla. 1st DCA 1991) *rev. denied,* 592 So.2d 680 (Fla. 1991)

Petitioner appealed on the Fourteenth Amendment question to the Supreme Court of Florida. (App., *infra*, 29a-39a)

The Supreme Court of Florida, in a 4-3 decision, declined to exercise jurisdiction and denied the Petitioner's Petition for Review. (App., *infra,* 1a)

Although Petitioner had properly raised his federal constitutional claim in the courts below neither the 4th DCA nor the Supreme Court of Florida expressly made reference to the federal constitutional question. (App., *infra*, 1a; 2a-3a; 19a-28a; 29a-39a)

REASONS FOR GRANTING PETITION

I. The decision of the Supreme Court of Florida conflicts with the decision of the Supreme Court of New Mexico, the decisions of two circuit courts of appeal, and the decision of this Court in *Mitchell v. W.T. Grant* 416 U.S. 600 (1974).

This Court should grant certiorari to affirm its holding in *Mitchell,* that under circumstances similar to *Mitchell,* due process requires that damages are immediately awardable upon the dissolving of a wrongfully issued prejudgment writ of replevin.

This Court should exercise its jurisdiction to address the important constitutional due process question: in order to pass constitutional muster under *Mitchell* § 78.20 Fla. Stat. (2007) must be applied to Petitioner to require that Petitioner is immediately entitled to damages (as set out in *Mitchell* at 606, n. 8) upon the dissolving of the wrongfully issued writ of prejudgment replevin under § 78.068(6) Fla. Stat. (2007); damages may not be postponed until the Petitioner prevails, if at all, in the main replevin action.

In *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1001 (11th Cir. 1987) the Eleventh Circuit interpreted *Mitchell* as holding that damages are awardable immediately upon the dissolving of a wrongfully issued prejudgment writ or replevin:

> In addition, the statute [*in Mitchell*] provided that, "the defendant [debtor] by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff

> proves the grounds upon which the writ was issued." Id. at 622, 94 S.Ct. at 1907. **The Supreme Court interpreted this provision as allowing for an immediate hearing to determine whether the writ was wrongfully issued. Id. at 618, 94 S.Ct. at 1905. Finally, the debtor was protected by a provision in the statute which allowed for damages for the wrongful issuance of a writ, and for attorney's fees, "whether the writ is dissolved on motion or after trial on the merits." Id. at 617, 94 S.Ct. at 1905.** [Emphasis supplied]

Similarly the Eight Circuit in *Watertown Equipment Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487 (8th Cir. 1987) interpreted *Mitchell* as holding that damages are awardable immediately upon the dissolving of a wrongfully issued prejudgment writ or replevin:

> The Supreme Court has recognized that the creditor must post a bond and be liable for any damages resulting from a wrongful attachment. *Mitchell*, 416 U.S. at 610, 617, 618-19, 94 S.Ct. at 1901, 1905, 1905-06. **The bond and full liability of the creditor serve two purposes. They deter an overzealous creditor from using attachment in the first place. Id. at 609-10, 94 S.Ct. at 1900-01. And, more importantly, they make the debtor whole if the attachment turns out to be wrongful. Id. at 617,**

> **618, 619, 94 S.Ct. at 1905, 1905, 1906.**
>
> *Mitchell* clearly directs that not only must there be provision for payment to the defendant for damages, but also the payment must be sufficient. **The Louisiana sequestration statute allowed damages for deprivation of the use of the sequestered property, humiliation, injury to reputation, and attorney's fees. Id. at 606 and n. 8, 94 S.Ct. at 1899 and n. 8.** As the Supreme Court noted in its final paragraph summarizing why the Louisiana sequestration statute was constitutional, "the prevailing party is protected against all loss." 416 U.S. at 619, 94 S.Ct. at 1906 (emphasis added). Id. at 625, 94 S.Ct. at 1909 (Emphasis supplied).

Similarly, *McMurrain*, *supra*, at 1032-1033 interpreted *Mitchell* as holding that damages are awardable immediately upon the dissolving of a wrongfully issued the prejudgment writ or replevin:

> We again emphasize that under the holdings of *Fuentes* and *Mitchell*, Florida's prejudgment treplevin procedure would be unconstitutional in the absence of these protections. Under the holdings of these cases, the immediate post-seizure hearing on a motion to dissolve the prejudgment writ is the point at which the plaintiff is "put to his proof" of his right to possession of the property pending trial. Upon the

> plaintiff's failure to prove such right, the trial court is mandated to dissolve the prejudgment writ, order the wrongfully seized property returned to the defendant, **and award damages, if any have been incurred, to the defendant.** The prejudgment replevin proceeding is at this point, concluded for all practical purposes. If the complaint contains counts for ordinary replevin and other causes of action, as does the complaint in this case, those claims obviously remain pending trial. **However the continuing pendency of those claims does not serve as a defense to the defendant's right to relief immediately upon the dissolution of a wrongfully issued prejudgment writ of replevin.** .....
>
> We agree with [petitioner] that unless he is given immediate relief without regard to the pending cause of action, the mandate of this court will be meaningless and substantially ineffective. (Emphasis supplied)

First National Bank of Santa Fe v. Southwest Yacht 684 P.2d 517 (N.M. 1984) illustrates the significance of Petitioner's constitutional challenge. In *First National Bank of Santa Fe, supra,* the defendant, *inter alia,* sought damages for wrongful replevin.

The Supreme Court of New Mexico, New Mexico's highest court, noted that in 1975 a statutory remedy had been added to meet the constitutional due process requirements of *Mitchell:*

upon the dissolving of a prejudgment writ of replevin the defendant was entitled to attorneys' fees and double damages for the loss of use of the wrongfully replevied property.

In *First National Bank of Santa Fe, supra,* the court noted at 522 as follows:

> Additionally the history [of added statutory remedy] indicates that it was enacted to prevent a defendant from being forced to pay his own attorney fees to quash a writ issued based on a defective affidavit. Such payment of fees would **subvert the due process requirements establish in *Mitchell v. W.T. Grant Co.*** (Emphasis supplied)

Petitioner's constitutional argument, following the reasoning of *Mitchell* as interpreted by *McMurrain, First National Bank of Santa Fe, Watertown,* and *Jones, supra,* is as follows: If Petitioner is not immediately entitled to damages upon the dissolving of a wrongfully issued writ of prejudgment replevin; but, an award of damages to Petitioner has to be postponed until the Petitioner prevails, if at all, in the main replevin action, then the constitutional due process requirements of *Mitchell* are subverted.

Consequently, § 78.20 Fla. Stat. (2007) as applied to Petitioner by the Supreme Court of Florida violates the due process requirements of the Fourteenth Amendment and is unconstitutional. If state law subverts the due process requirements of the Fourteenth Amendment then that state law is either unconstitutional on its face or as applied.

II. The decision of the Supreme Court of Florida is Final: 28 U.S.C. § 1257(a).

This Court has jurisdiction to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution ..." 28 U.S.C. § 1257(a)

Petitioner seeks review of the Supreme Court of Florida's decision, which, as set out, *supra,* violates the Fourteenth Amendment. Petitioner properly raised his federal claim in the courts below. (App., *infra,* 19a-28a; 29a-39a)

Accordingly, the question presented in the petition plainly falls within the jurisdiction of this Court under 28 U.S.C. § 1257(a). The judgment below is final for purposes of this Court's certiorari jurisdiction.

The decision of Supreme Court of Florida on the federal question is, in substance, *res judicata,* The federal question may not again be brought before this Court. Even though the 4th DCA certified direct conflict appellate review of 4th DCA judgment upholding the constitutionality of § 78.20 Fla. Stat. (2007) as applied to Petitioner is within the discretionary jurisdiction of the Supreme Court of Florida. When the Supreme Court of Florida declined to exercise jurisdiction and denied the Petitioner's petition for review the Supreme Court of Florida squarely rejected Petitioner's argument that constitutionally Petitioner was immediately entitled to damages upon the dissolving of the wrongfully issued prejudgment writ of replevin. Consequently the Supreme Court of Florida's judgment is a final

judgment or decree "rendered by the highest court of a State in which a decision could be had . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution". 28 U.S.C. § 1257(a)

If this were not so certiorari review to this Court from Florida would effectively be blocked on jurisdictional grounds (and 28 U.S.C. § 1257(a) unconstitutionally subverted) by the Supreme Court of Florida's declining to exercise its discretionary appellate jurisdiction in similar situations—where the Florida District Courts, deny constitutional challenges and uphold the constitutionality of Florida statutes.

In addition a petition to this Court on this constitutional issue outside of the ninety (90) days from judgment plus extension of time would be jurisdictionally untimely. *Budinich v. Bechton Dickinson & Co.* 486 U.S. 196 (1988) Therefore, this matter is ripe to be decided by this Court at this time.

Moreover, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in the state courts.

This Court discussed the *Cox* categories in *Pierce County v. Guillen*, 537 U. S. 129, 141-142 (2003):

> Under 28 U. S. C. § 1257(a), this Court has certiorari jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a . . . statute of the

> United States is drawn in question . . . on the ground of its being repugnant to the Constitution . . . of the United States." As a general matter, to be reviewed by this Court, a state-court judgment must be final "`as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Jefferson* v. *City of Tarrant,* 522 U. S. 75, 81 (1997) (quoting *Market Street R. Co.* v. *Railroad Comm'n of Cal.,* 324 U. S. 548, 551 (1945)). We have acknowledged, however, that certain state-court judgments can be treated as final for jurisdictional purposes, even though further proceedings are to take place in the state courts. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 477-483 (1975) (outlining four exceptions to the finality rule). See also, *e.g., ASARCO Inc.* v. *Kadish,* 490 U. S. 605, 611-612 (1989) (applying the *Cox* exceptions); *Duquesne Light Co.* v. *Barasch,* 488 U. S. 299, 306-307 (1989) (same).

Petitioner's Motion for Damages (App., *infra*, 16a-18a) arises as a consequence of his successful Motion to Dissolve the wrongfully issued writ of prejudgment replevin. (App., *infra*, 7a-15a)

Petitioner's Motion for Damages wherein Petitioner is, in substance, the plaintiff, and Respondent, the defendant, is separate and "sufficiently disassociated" from the main replevin action in which Petitioner is the defendant and Respondent, the plaintiff.

Petitioner has one state law claim, the Motion for Damages, in which claim arises the federal constitutional question which has been decided finally and conclusive against Petitioner. The remaining state law claims are asserted by Respondent against Petitioner.

The first category set out in *Cox, supra,* at 479 permits review in

> ....those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.

The first category is applicable here. The Florida Supreme Court has finally adjudicated the constitutionality of § 78.20 Fla. Stat. (2007) as applied, squarely rejecting Petitioner's argument that constitutionally Petitioner is immediately entitled to damages upon the dissolving of the wrongfully issued prejudgment writ of replevin.

Therefore the judgment of the Florida Supreme Court on the federal issue is deemed final and/or has left the outcome of further proceedings preordained. This Court is "presented with the State's last word on the constitutionality" of § 78.20 Fla. Stat. (2007) as applied to Petitioner. *Duquesne Light Co. v. Borsch*, 488 U.S. 299, 307 (1989); *Asarco v. Kadish*, 490 U.S. 605 (1989)

The third category set out in *Cox, supra,* at 481 permits review

> .....where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing law would not permit him again to present his federal claims for review.

The third category also is applicable here. If Respondent loses his remaining state replevin claim against Petitioner at trial (and Petitioner wins) the federal question will be mooted and Petitioner will only need to prove up his damages. However, an important constitutional issue will remain undecided by this Court. If Respondent wins its state law replevin claim at trial Petitioner will not be able again to present his constitutional question and his Motion for Damages. The trial court, the 4th DCA, and the Supreme Court of Florida have ruled against Petitioner—have upheld the constitutionality of § 78.20 Fla. Stat. (2007) as applied to Petitioner, squarely rejecting Petitioner's argument that constitutionally Petitioner was immediately entitled to damages upon the dissolving of the wrongfully issued prejudgment writ of replevin.

Because Petitioner may not under Florida law present the constitutional issue again in the Florida courts Petitioner will not be able again to

petition this Court on the federal constitutional question. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)

For Petitioner to lose the main replevin action at trial there would have to be a jury verdict for damages against Petitioner in favor of Respondent. After the adverse jury verdict Petitioner would have to present to the trial court the federal question by motion. The trial court would not hear the Motion: the trial court has ruled on the motion against Petitioner, which ruling has been upheld by the 4th DCA and the Supreme Court of Florida.

Petitioner would have to appeal the adverse jury verdict in the main replevin action to the 4th DCA and within that appeal attempt to present his Fourteenth Amendment claim again to the 4th DCA.

The 4th DCA would not hear Petitioner's Fourteenth Amendment claim. If the 4th DCA were to uphold the adverse jury verdict against Petitioner would have no basis to appeal to the Supreme Court of Florida. An adverse jury verdict is not one of the enumerated bases upon which to petition the Supreme Court of Florida to exercise its discretionary jurisdiction. Therefore, Petitioner could not again bring his Fourteenth Amendment claim before this Court.

Because of the unusual facts of this case including the fact that in substance, we have two separate actions, (1) ordinary replevin by Respondent against Petitioner and (2) Motion for Damages by Petitioner against Respondent (as a result of wrongfully issued writ of prejudgment replevin) with respect to the third *Cox* category this case is distinguishable from *Jefferson v. City of Tarrant Alabama*, 522 U.S. 75 (1997) and the tort discovery issue in *Pierce County v. Guillen*, 537 U. S.

129 (2003) and comes within the reasoning of *Ritchie, supra,* and the PDA suit in *Pierce County.*

Since Petitioner's Motion for Damages is an action separate from the remaining ordinary replevin action the decision of the Florida Court's on the Fourteenth Amendment is best understood as *res judicata* rather than "law of the case". [1]

This Court stated in *Pennsylvania v. Ritchie,* 480 U.S. 39, 49, n. 7 (1987):

> Law-of-the-case principles are not a bar to this Court's jurisdiction, of course, and thus Justice Stevens' dissent apparently would require the Commonwealth to raise a fruitless Sixth Amendment claim in the trial court, the Superior Court, and the Pennsylvania Supreme Court still another time before we regrant certiorari on the question that is now before us.
>
> The goals of finality would be frustrated, rather than furthered, by

---

[1] *McMurrain, supra,* at 1032: We again emphasize that under the holdings of *Fuentes* and *Mitchell,* Florida's prejudgment replevin procedure would be unconstitutional in the absence of these protections. Under the holdings of these cases, the immediate post-seizure hearing on a motion to dissolve the prejudgment writ is the point at which the plaintiff is "put to his proof" of his right to possession of the property pending trial. Upon the plaintiff's failure to prove such right, the trial court is mandated to dissolve the prejudgment writ, order the wrongfully seized property returned to the defendant, and award damages, if any have been incurred, to the defendant. **The prejudgment replevin proceeding is at this point, concluded for all practical purposes.** If the complaint contains counts for ordinary replevin and other causes of action, as does the complaint in this case, those claims obviously remain pending trial. (Emphasis supplied)

> these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine—efficiency, judicial restraint, and federalism, see *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); post, at 72—would be ill served by another round of litigation on an issue that has been authoritatively decided by the highest state court.

As this Court stated in *Jefferson v. City of Tarrant Alabama*, 522 U.S. 75, 84-85 (1997):

> In *Ritchie*, we permitted immediate review of a Pennsylvania Supreme Court ruling that required the Commonwealth's Children and Youth Services (CYS) to disclose to a criminal defendant the contents of a child protective service file regarding a key witness. The Court asserted jurisdiction in that case because of the "unusual" situation presented: We doubted whether there would be any subsequent opportunity to raise the federal questions, see *ibid.*, and we were reluctant to put the CYS in the bind of either disclosing a confidential file or being held in contempt, see *id.*, at 49, 107 S.Ct., at 997.

The fourth category set out in *Cox, supra,* at 483 permits review

> .....where the federal issue has been finally decided in the state courts with further proceedings pending in which

> the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and, where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the ....state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, this Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

The fourth *Cox* category is plainly applicable here. The federal question presented by this case has been finally decided by the court below, which squarely rejected Petitioner's argument that Petitioner, constitutionally, was immediately entitled to damages upon the dissolving of the prejudgment writ of replevin. Accordingly, a federal issue has been conclusively resolved, and there is no need for further state court proceedings to finalize or crystallize the lower court's disposition of the federal question.

It is possible that, absent immediate review, Petitioner might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive

of any further litigation on the relevant cause of action, *viz.* on Petitioner's Motion for Damages, rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

It is certainly possible that a jury verdict in favor of Petitioner at trial would eliminate Petitioner's need to litigate further the Fourteenth Amendment matter, thereby depriving this Court of an opportunity to decide the important constitutional and statutory issues at stake.

If, as Petitioner contends, under the Fourteenth Amendment, Petitioner is immediately entitled to damages upon the dissolving of the wrongfully issued prejudgment writ of replevin the determination of this federal issue would be preclusive of any further state court litigation on the federal question raised by the Motion for Damages.

§ 78.20 Fla. Stat. (2007) must be applied to Petitioner to require that Petitioner is immediately entitled to damages upon the dissolving of the wrongfully issued writ of prejudgment replevin under § 78.068(6) Fla. Stat. (2007); damages may not be postponed until the Petitioner prevails, if at all, in the main replevin action.

Finally, since the Florida judgment conflicts with *Mitchell*, the decision of the Supreme Court of New Mexico, and the decisions of two circuit courts of appeal, it is readily apparent that "a refusal immediately to review the state court might seriously erode federal policy." *Cox, supra* at 483.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 12, 2009

APPENDIX A

Supreme Court of Florida
Tuesday, October 14, 2008

CASE NO: SC08-856
Lower Tribunal No(s): 4D08-882

JUSSI K. KIVISTO

vs. GMAC LLC *F/K/A* GENERAL MOTORS ACCEPTANCE CORPORATION

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on Certified Direct Conflict of Decisions pursuant to Article V, Section 3(b), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), and the Court having determined that it should decline to exercise jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

QUINCE, C.J., LEWIS, CANADY, and POLSTON, JJ, concur.
WELLS, ANSTEAD, and PARIENTE, JJ, dissent.

A True Copy
Test:
//Thomas D. Hall//
Thomas D. Hall
Clerk, Supreme Court

APPENDIX B

DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT
January Term 2008

JUSSI K. KIVISTO,
Petitioner,
v.
GMAC LLC f/k/a GENERAL MOTORS
ACCEPTANCE CORPORATION,
Respondent.

No. 4D08-882

[April 16, 2008]

PER CURIAM.

The issue raised by this petition for certiorari is when, in a replevin action in which the defendant has prevailed, the court must award defendant damages. In a non-final order the trial court ordered plaintiff to return the vehicle to defendant, but postponed a determination of damages for a later hearing to be scheduled.

In *McMurrain v. Fason,* 584 So. 2d 1027 (Fla. 1st DCA 1991), the first district granted a petition for certiorari under similar circumstances, holding that damages were due immediately upon the dissolving of the writ. Prior to *McMurrain,* this court had construed section 78.20, Florida Statutes (2007), upon which this issue turns, in a manner contrary to *McMurrain. Gimbel v.*

Int'l Mailing and Printing Co., 506 So. 2d 1081 (Fla. 4th DCA 1987). After *McMurrain* was decided the fifth district, in *Trans Atlantic Distributors, L.P. v. Whiland Co., S.A.*, 671 So. 2d 883 (Fla. 5th DCA 1996) adopted our holding in *Gimbel* and disagreed with *McMurrain*.

We agree that this order is reviewable by certiorari, based on *McMurrain*, but we disagree with the holding on the merits on *McMurrain* and agree with *Trans Atlantic*. We certify direct conflict with *McMurrain v. Fason*, 584 So. 2d 1027 (Fla. 1st DCA 1991).

Petition denied.

SHAHOOD, C.J., POLEN AND KLEIN, JJ., concur.

Petition for writ of certiorari to the Fifteenth Judicial Circuit, Palm Beach County; Glenn Kelly, Judge; L.T. Case No. 502007CA006713XXXXM

Jussi K. Kivisto of Kivisto Law Firm, Lake Worth, pro se.

Mark J. Bernet of Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A., Tampa, for respondent.

Not final until disposition of timely filed motion for rehearing

APPENDIX C

KIVISTO LAW FIRM

J.K. Kivisto, Esq

Ph (561) 588-5328
Fax (561) 588-5419
klfjk@aol.com

1010 Tenth Avenue North, Suite 2
Lake Worth, FL 33460

December 27, 2006

GMAC Smart Lease
P.O. Box 3100
Midland, TX 79702-3100

RE: 029-9025-50834
03 Cadi Escalade
3GYEK63N53G163957

Jussi K. Kivisto

Dear Sirs:

This responds to your letter of December 11, 2006, copy enclosed for your convenience, and is further to my telephone conversation today with supervisor Reggie Winston of GMAC Smart Lease

This lease is scheduled to end on January 25, 2007. This Cadillac was acquired from the show room of Coral Cadillac in Pompano Beach, FL by way of a Smart Lease on January 26, 2003. The Cadillac was equipped with certain dealer installed options with a package price of $11,220.00, *viz.*, Custom Chrome Vogue 22Wheels/Tyres; Custom

Chrome Verticle Grille; and, Custom Chrometoe Hooks-- a copy of such dealer installed options enclosed for your convenience.

As the lease was being finalized, at the eleventh hour, the salesman informed the Lessee that the dealer options could not be acquired by lease but had to be purchased out outright. The Lessee agreed to lease the Cadillac and to purchase such dealer installed options on the condition that the price of such dealer installed options in the amount of $11,220.00 would be credited in full in the Purchase Option Price in paragraph 20 of the Smart Lease. Both the Coral Cadillac salesman and the finance man assured the Lessee that the $25,261.00 Purchase Option Price in paragraph 20 of the Smart Lease contained the full $11,220.00 credit. Consequently such condition was condition precedent to the formation of the GMAC Smart Lease and/or the formation of the GMAC Smart Lease was contingent upon such condition.

We bring your attention to the January 2007 Black Book National Auto Research Official Used Car Market Guide Monthly, copy of the relevant page enclosed, showing the wholesale values for the Cadillac to be $26,500 and $24,300. Clearly the dealer installed options in the amount of $11,220.00 have not been credited in full in the Purchase Option Price in paragraph 20 of the Smart Lease as had been agreed on January 26, 2003. Pursuant to the agreement between the parties the Purchase Option Price in paragraph 20 of the Smart Lease is $14,041.80 **NOT** $25,261.80.

When one of GMAC's representatives called today we attempted to bring your mistake to your attention. We were referred to one of the supervisors, Reggie Winston, I believe, who was

singularly unhelpful--more interested in playing Matlock and word games than trying to resolve this issue.

According to paragraph 40 of the Smart Lease the vehicle is to be returned "including any dealer installed options you do **not** buy outright". Under the terms of the Smart Lease, such outright bought dealer installed options are not to be returned to you but belong to the Lessee.

Please be advised that the Lessee, pursuant to the terms of the Smart Lease, hereby exercises his right under paragraph 20 of the Smart Lease to purchase the Cadillac for the agreed to Purchase Option Price of $14,041.80 plus official fees and costs.

Best regards,

Sincerely,

//jk kivisto/

J.K. Kivisto

cc: Business Manager, Coral Cadillac

APPENDIX D

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

GMAC, LLC f/k/a GENERAL MOTORS ACCEPTANCE CORPORATION

Plaintiff

CIVIL DIVISION AA
NO. 502007CA006713XXXXMB

JUSSI K. KIVISTO

Defendant

_____/

MOTION TO DISMISS PLAINTIFF'S COMPLAINT (Prejudgment Writ of Replevin, F.S.A. s. 78.068) and MOTION TO DISSOLVE PREJUDGMENT WRIT OF REPLEVIN

I

MOTION TO DISMISS PLAINTIFF'S COMPLAINT (Prejudgment Writ of Replevin, F.S.A. s. 78.068)

Defendant, Jussi K. Kivisto, by an through his undersigned attorney, moves this Court for an order dismissing the Plaintiff's Complaint, and as grounds therefor states as follows.

1. The Complaint is insufficient on its face for its failure to show in an affidavit or verified complaint that the defendant is engaging in, or is

about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser during the pendency of the action or that the defendant has failed to make payment as agreed as required by F.S. s. 78.068(1) & (2). See *Lennox Retail. v.* McMillian, 786 So.2d 1252 (Fla. 5th DCA 2001); *Fort Lauderdale Collection v. Rosamelia,* 677 So.2d, 973 (Fla. 4th DCA 1996); *McMurrain v. Fason,* 584 So.2d 1027 (Fla. 1st DCA 1991), *rev.den.* 592 So.2d 680; *Comcoa v. Coe,* 587 So.2d 474 (Fla. 3rd DCA 1991).

2. The Complaint is insufficient on its face for its failure to state that "the plaintiff is the owner of the claimed property or is entitled to possession of it, describing the source of such title or right as required by F.S. s. 78.055(2).

3 The Complaint is insufficient on its face for its failure to attach a copy of a written instrument evidencing that Plaintiff is the owner of the claimed property or is entitled to possession of it, as required by F.S. s. 78.055(2) and Rule 1.130(a).

4. Paragraph 3 of the Complaint states that Plaintiff is "the owner and holder of the Lease Agreement." The Lease Agreement is attached as Exhibit "A" to the Complaint.

5. The Complaint is insufficient on its face for its failure to attach a copy of a written instrument evidencing that Plaintiff is the "owner and holder of the Lease Agreement" as required by F.S. s. 78.055(2) and Rule 1.130(a). The Lease Agreement attached as Exhibit "A" to the Complaint purports to show that Coral Cadillac, Inc., not the Plaintiff, as the "owner and holder of the Lease Agreement". Further, none of the assignment boxes

of section 2 of the Lease Agreement is checked and no written instrument purporting assign the Lease Agreement is attached to the Complaint as required by F.S. s. 78.055(a) and Rule 1.130(a).

6. Plaintiff's allegations in paragraph 6 of the Complaint that as a result of the Plaintiff's ownership of the vehicle the Plaintiff is entitled to possession is contradicted by the copy of the Lease Agreement attached to the Complaint which purports to show Coral Cadillac, Inc. to be the owner of the vehicle, not the Plaintiff, and is contradicted by the copy of the Certificate of Title attached to the Complaint which purports to show Plaintiff as "1st lien holder" not the owner of the vehicle.

7. Plaintiff has failed to join an indispensable party to the proceedings, Coral Cadillac, Inc., who is the owner and holder of the Lease Agreement.

8. Paragraph 5 of the Complaint alleges, *inter alia,* that demand has been made on Defendant and Paragraph 11 of the Complaint alleges that all conditions precedent to the institution of this action have been met or have been fulfilled.

9. By not alleging that written demand has been made and by not attaching a copy of such written demand as required under Rule 1.130 the Complaints is insufficient on its face for its failure to satisfy a condition precedent for filing this action.

WHEREFORE, the Defendant respectfully requests that this Court dismiss the Complaint filed herein, thereby dissolving the Prejudgment Writ of Replevin and award the Defendant reasonable attorneys' fees and costs under F.S. s. 57.105, judgment against Plaintiff for damages for wrongful taking, attorney fees, and costs pursuant to chapter

78 of the Florida Statues, and such other relief as may be just and proper.

II
MOTION TO DISSOLVE PREJUDGMENT WRIT OF REPLEVIN

Defendant, Jussi K. Kivisto, by an through his undersigned attorney, pursuant to F.S. s. 78.068(6) moves this Court for an order dissolving the Prejudgment Writ of Replevin and as grounds therefor states as follows.

10. The grounds relied upon for the issuance of the writ do not clearly appear from the specific facts shown in an affidavit or verified complaint that the Defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser during the pendency of the action or that the Defendant has failed to make payment as agreed as required by F.S. s. 78.068 (1) & (2). See *Lennox Retail. v.* McMillian, 786 So.2d 1252 (Fla. 5th DCA 2001); *Fort Lauderdale Collection v. Rosamelia,* 677 So.2d, 973 (Fla. 4th DCA 1996); *McMurrain v. Fason,* 584 So.2d 1027 (Fla. 1st DCA 1991), *rev.den.* 592 So.2d 680; *Comcoa v. Coe,* 587 So.2d 474 (Fla. 3rd DCA 1991).

11. The Plaintiff's averments in the attached affidavit are not legally sufficient to support the findings required by F.S. s. 78.068(2). *See* cases cited in paragraph 9, *supra.*

12. The GMAC Account Summary dated 12/04/06, attached hereto as Exhibit A and incorporated herein by reference, shows that

Defendant as had made all the payments required under the Lease Agreement. Consequently, under no set of facts can the Plaintiff show in any hearing that Defendant "has failed to make payment as agreed" within the meaning of F.S. s. 78.068(2).

13. As evidenced by Plaintiff counsel's letter of December 27, 2006 addressed to GMAC with copy to Coral Cadillac, attached hereto as Exhibit B and incorporated herein by reference, (the "12/27/06 Option Purchase Letter") Defendant exercised his option to purchase the vehicle pursuant to the terms of the Lease Agreement.

14. In an e-mail dated 1/23/07 to Defendant, attached hereto as Exhibit C and incorporated herein by reference, the Business Manager of Coral Cadillac, Scott Zislin, acknowledged receipt 12/27/06 Option Purchase Letter.

15. Defendant replied to Mr. Zislin's e-mail of 1/23/07 on 1/23/07, attached hereto as Exhibit D, and incorporated herein by reference, tendering the option purchase price called for by the Lease Agreement and furnishing the 12/27/06 Option Purchase Letter in the body of the e-mail as well as in a separate attachment.

16. By return e-mail of 1/24/07, attached hereto as Exhibit E and incorporated herein by reference, Mr. Zislin told Defendant **not to send him any money** and instructed Defendant to contact GMAC directly. Defendant followed Mr. Zislin's instructions.

17. By return e-mail of 1/24/07, attached hereto as Exhibit F and incorporated herein by reference, Defendant requested that Mr. Zislin provide Defendant with a GMAC contact person to which e-mail Scott Zislin replied by e-mail of 1/25/07,

also attached hereto as Exhibit F and incorporated herein by reference, furnishing Defendant with a general 800 line for GMAC.

18. On 1/25/07 Defendant sent a copy of the 12/26/06 Option Purchase Letter together with the e-mails set out above to Natosha Goodew of GMAC in Greeley, CO as evidenced by FedEx invoice and e-mails, attached hereto as Composite Exhibit G and incorporated herein by reference. Natosha Goodew's superior, Missy, agreed with Defendant's position. See composite Exhibit H, below.

19. Attached hereto as composite Exhibit H and incorporated herein by reference, are Defendant's letters faxes, from 1/30/07 to 2/20/07, including correspondence to Gina Dion of GMAC in Knoxville, TN who Defendant had been informed was now in charge of the matter) evidencing Defendant's numerous attempts by telephone, fax, and letter confirming that Defendant had exercised the Lease Purchase Option via his 12/26/06 Option Purchase Letter, that Defendant had not bee furnished a copy of the Lease, and advising GMAC **that GMAC was in breach of contract.** In a telephone conversation of 2/13/07, Reggie Watson of GMAC, informed Defendant that **"did not want to and did not need to read anything".** Defendant suggested that GMAC consult with its attorneys who, unlike GMAC, would and could read. At no time has Gina Dion nor any representative of GMAC had the courtesy of responding to Defendant's telephone calls, faxes, letters or to the 12/26/06 Option Exercise Letter.

20. On March 29, 2007 Defendant sent to Gina Dion the 12/26/06 Option Exercise Letter by FedEx, attached hereto as Composite Exhibit I and

incorporated herein by reference, again requesting a response to the 12/26/06 Option Exercise Letter.

21. After more than 6 months GMAC has not responded to the 12/26/06 Option Exercise Letter. Accordingly, Defendant's 12/26/06 Option Exercise Letter remains, as a matter of law, uncontroverted. By its conduct and laches, as a matter of law, GMAC is estopped from alleging that the vehicle is being wrongfully detained by Defendant, from denying that Defendant, on 12/26/06 exercised the Lease Option Purchase according to the terms of the Lease Agreement and from denying that, both in law and equity, Defendant is the owner of the vehicle.

22. Consequently, under no set of facts can the Plaintiff show in any hearing that Defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser during the pendency of the action as required by F.S. s. 78.068(2). The record is clear that for more than 6 months GMAC has been doing the Texas two step and hiding from the Defendant.

23. Plaintiff alleges in paragraph 7 of the Complaint, *inter alia,* that "To Plaintiff's best knowledge, information and belief, the Property is being detained for purposes **unknown** to the Plaintiff." The records clearly shows that this allegation is false and GMAC and its counsel know the allegation to be false. Both GMAC and its counsel know with legal certainty that that the Property is being detained for purposes **known** to the Plaintiff. In the sworn Affidavit in Support of Replevin Complaint, account specialist of GMAC,

Frances Morgando, swears and subscribes, upon personal
knowledge, that the allegations contained in the Complaint, including the allegations contained in paragraph 7 of the Complaint are true and accurate.

24. Since Frances Morgando of GMAC has knowingly sworn to a false affidavit Frances Morgando's sworn statement is a knowing material misstatement of fact in a material matter in a legal proceeding and constitutes perjury. Further the actions of GMAC, its counsel, Michael Kass, Esq. and Kass, Shuler, Solomon, Spector & Singer, P.A. constitute suborning perjury.

25. The Prejudgment Writ of Replevin should be dissolved for insufficiency of process, insufficiency of service of process, lack of personal and subject matter jurisdiction. The Prejudgment Writ of Replevin served at Defendant's residence on June 26, 2007 was a copy of the Writ signed and sealed by the Clerk on May 29, 2007. Rule 1.070(a) requires service of the Clerk's original signed and sealed Writ, not a copy thereof. See Exhibit J.

26. Plaintiff has failed to join an indispensable party to the proceedings, Coral Cadillac, Inc., who is the owner and holder of the Lease Agreement.

27. Due to Plaintiff's knowing wrongful taking Defendant had had to employ its undersigned attorney to file these Motions for which Defendant will incur costs and attorney's fees.

WHEREFORE, the Defendant respectfully requests that this Court dissolve the Prejudgment Writ of Replevin, award the Defendant reasonable attorneys' fees and costs under F.S. s. 57. 105, judgment against Plaintiff for damages for wrongful taking, attorney fees, and costs pursuant to F.S.

chapter 78 of and such other relief as may be just and proper, including without limitation, and Order to Show Cause why Frances Morgando, GMAC, its counsel, Michael Kass, Esq. and Kass, Shuler, Solomon, Spector & Singer, P.A. should not be held in contempt and/or criminal contempt of Court.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail to Michael Kass, Esq., P.O. Box 800, 1505 N. Florida Ave., Tampa, FL 33601-0800 this 6th day of July, 2007.

KIVISTO LAW FIRM
1010 Tenth Avenue North, Suite 2
Lake Worth, Florida 33460-2107
Phone: (561) 588-5328; klfjk@aol.com
Fax: (561) 588-5419

By: //jk kivisto//
J.K. Kivisto
FL Bar No. 362638

APPENDIX E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

GMAC, LLC f/k/a GENERAL MOTORS ACCEPTANCE CORPORATION

Plaintiff

CIVIL DIVISION AA
NO. 502007CA006713XXXXMB

JUSSI K. KIVISTO

Defendant

_____/

DEFENDANT'S MOTION FOR AWARD OF DAMAGES, COSTS AND ATTORNEY'S FEES AGAINST PLAINTIFF AND SURETY, SAFECO INSURANCE COMPANY OF AMERICA, UNDER SURETY BOND

Defendant, JUSSI K. KIVISTO ("Kivisto"), by and through his undersigned attorney, pursuant to Rule 1.625, Florida Rules of Civil Procedure, moves the Court for an award of damages, costs and attorneys' fees against Plaintiff and SAFECO INSURANCE COMPANY OF AMERICA ("Surety") under the pre-judgment replevin bond posted in the above-referenced matter and says:

1. On or about May 2, 2007, the above-styled action was commenced with the filing of a Complaint for pre-judgment writ of replevin. On May 17, 2007, a properly executed surety bond in the

amount of $53,250.00, guaranteed by Surety, Safeco Insurance Company of America, was filed and approved by the Clerk of Court.

2. Pursuant to Rule 1.625, Florida Rules of Civil Procedure, this Court has jurisdiction of Surety in this action by virtue of the approval of the bond by the Clerk at the time of filing.

3. On August 3, 2007, the Court entered its Order, *inter alia,* granting Kivisto's Motion to Dissolve Prejudgment Writ of Replevin and ordering the Plaintiff, GMAC LLC, to return and surrender to Kivisto One Black 2003 Cadillac Escalade, VIN 3GYEK63N53G163957. The order granting the motion to dissolve the prejudgment writ had the effect of determining that Plaintiff's seizure of the vehicle in question pursuant to the pre-judgment writ was wrongful and entitling Kivisto to damages from Plaintiff and the Surety. The Order further specifically provided:

> Defendant's claim against the bond for damages, costs and attorney's fees, if any, shall be determined by the Court at a hearing scheduled for that purpose.

4. Kivisto was damaged by the improper taking of the vehicle, loss of use of the vehicle, the inconvenience of having to retrieve it after the entry of the Court's order directing that it be returned, damage to the vehicle while it was not in the possession of Kivisto and damage to Kivisto's reputation in the community due to the wrongful replevin of the vehicle. Further, Kivisto has incurred attorney's fees and costs in connection obtaining the dissolution of the improper writ.

WHEREFORE, Defendant, JUSSI K. KIVISTO, respectfully requests this Court to enter an order awarding damages in favor of Kivisto, against Plaintiff and Surety, in an amount to be determined by the Court after evidentiary hearing and awarding such other and further relief as the Court may deem just and appropriate under the circumstances.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Michael Kass, Esquire, Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A., 1505 N. Florida Avenue, Tampa, Florida 33601 by U. S. Mail and to the Florida Registered Agent of Safeco Insurance Company of America, c/o Chief Financial Officer, P.O. Box 6200, 200 East Gaines Street, Tallahassee, Florida 32399 and Karen L. Daniel, Esq., Attorney-In-Fact for Safeco Insurance Company of America, Bluhm Legal Clinic, 357 East Chicago Avenue, Chicago, Illinois 60611, by Certified U. S. Mail, Return Receipt Requested, this 25th day of September, 2007.

EDWARD A. MAROD, P.A.
Counsel for Defendant
P.O. Box 3606
West Palm Beach, FL 33402
(561) 832-0050
561) 832-6324 Facsimile
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By: //Edward A. Marod//
Edward A. Marod, Esq.
Florida Bar No. 238961

APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JUSSI K. KIVISTO
Petitioner

vs.

L.T. 502007CA 006713 XXXX MB AA
PALM BEACH

GMAC LLC f/k/a GENERAL MOTORS ACCEPTANCE CORPORATION,
Respondent

_____/

PETITION FOR WRIT OF CERTIORARI

Pursuant to Fla. R. App. P. 9.100 Jussi K. Kivisto hereby petitions this court for a Writ of Certiorari to review and quash the trial court's *Order Granting Plaintiff's Motion to Preclude Evidence of Damages Absent Fulfillment of Conditions Precedent* (A-1) holding that Petitioner is not immediately entitled to damages under F.S. s. 78.20 upon obtaining dissolution of a wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6) but an award of damages (and, hearing on damages) has to be postponed until the Petitioner prevails, if at all, in the main replevin action.

Petitioner petitions this Court to quash the order of the trial court on the ground that Order is unconstitutional and thereby departs from the essential requirements of the law and causes him material harm for which there is no other remedy.

JURISDICTION

This Court has jurisdiction under Fla. Const. Art. V, Sec. 4(b)(1)-(3) and Fla. R. App. P. 9.030(b)(2) to issue a Writ of Certiorari to review the interlocutory orders of a lower court which are unconstitutional. *Rush Limbaugh v. State of Florida* 887 So. 2d 387, 394 (Fla. 4th DCA 2004); *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991) *rev. denied,* 592 So. 2nd 680 (Fla. 1991).

SUMMARY OF ARGUMENT

The trial court's holding that Petitioner is not immediately entitled to damages under F.S. s. 78.20 upon the dissolution of a wrongfully issued writ of prejudgment replevin pursuant to F.S. s 78.068(6) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution. F.S. s. 78.20, as applied and construed by trial court, is unconstitutional, violating the Due Process Clause of the Fourteenth the Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution.

STATEMENTS OF THE FACTS

On May 2, 2007 Respondent filed its *Complaint (Prejudgment Writ of Replevin, F.S.A. s. 78.068).* (A-2) On July 6, 2007 Petitioner filed his *Motion to Dismiss Complaint and Motion to Dissolve Prejudgment Writ of Replevin.* (A-3) At the 8/3/07 hearing on Petitioner's *Motion to Dissolve Prejudgment Writ of Replevin* Respondent failed to prove "the grounds upon which the writ was issued. Accordingly, on August 3, 2007 the trial Court entered its *Order, inter alia,* granting Petitioner's *Motion to Dissolve Prejudgment Writ of Replevin* (A-

4) and ordering the Respondent to return and surrender to Petitioner One Black 2003 Cadillac Escalade. The order granting the motion to dissolve the prejudgment writ of replevin had the effect of determining that Respondent's taking the vehicle in question pursuant to the prejudgment writ was wrongful and entitling Petitioner to damages from Respondent and the Surety.

> The *Order* (A-4) specifically provided:
> Defendant's claim against the bond for damages, costs and attorney's fees, if any, shall be determined by the Court at a hearing scheduled for that purpose.

Not until Petitioner filed a *Motion for Contempt* (A-5) did the Respondent surrender the vehicle to Petitioner. Petitioner was damaged by the improper taking of the vehicle, loss of use of the vehicle, the inconvenience of having to retrieve it after the entry of the Court's order directing that it be returned, damage to the vehicle while it was not in the possession of Petitioner and damage to Petitioner's reputation in the community due to the wrongful replevin of the vehicle. Further, Petitioner has incurred attorney's fees and costs in connection obtaining the dissolution of the improper writ.

Petitioner's timely *Motion for Rehearing on Motion to Dismiss Complaint (Prejudgment Writ of Replevin, F.S.A. s. 78.068)* (A-6) was denied. On September 27, 2007 Petitioner filed his *Motion for Award of Damages, Cost and Attorney's Fees Against Plaintiff and Surety, Safeco Insurance Company of America, Under Surety* (A-7); on January 30, 2008 Petititoner's *Amended Answer and Affirmative Defenses* was deemed filed under Agreed Order. (A-8)

On January 31, 2008 Respondent filed its *Motion to Preclude Evidence of Damages Absent Fulfillment of Conditions Precedent* (A-9) arguing that Petitioner was not immediately entitled to damages (and, hearing on damages) under F.S. s. 78.20 upon the dissolution of a wrongfully issued writ of prejudgment replevin under F.S. s. 78.068(6) but an award of damages had to be postponed until the Petitioner prevailed, if at all, in the main replevin action.

On January 31, 2008 the trial court granted the Respondent's Motion, rendering on February 1, 2008, *Order Granting Plaintiff's Motion to Preclude Evidence of Damages Absent Fulfillment of Conditions Precedent* (A-1) citing *Trans Atlantic Distributors v. Whitland* 671 So. 2d (Fla 5th DCA 1996) as authority, holding that Petitioner was not immediately entitled to damages (and, hearing on damages) under F.S. s. 78.20 upon the dissolution of the wrongfully issued writ of prejudgment replevin under F.S. s. 78.068(6) but an award of damages (and, hearing on damages) had to be postponed until the Petitioner prevailed, if at all, in the main replevin action.

Petitioner seeks to have this *Order* quashed on the ground that it is unconstitutional.

ARGUMENT

In *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) the Supreme Court found the Florida and Pennsylvania prejudgment replevin statutes as they then existed unconstitutional. As summarized in *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991) *rev. denied,* 592 So. 2nd 680 (Fla. 1991) the Supreme Court held that both statutes unconstitutional,

stating that they violated the Due Process Clause of the Fourteenth Amendment because they allowed a prejudgment writ of replevin to be summarily issued without notice or hearing based upon the plaintiff's bare assertion of entitlement. Two years later, in *Mitchell v. W.T. Grant,* 416 U.S. 600, 94 S. Ct. 1895, 40 L.ED. 2d 406 (1974) the Supreme Court, in a 5-4 decision, found the Louisiana prejudgment replevin statute to be constitutional. The Louisiana law authorized the issuance of the prejudgment writ upon the plaintiff's *ex parte* application without notice to defendant or without an opportunity for hearing, but the writ would issue only upon a verified petition or affidavit and a judge's authority after the plaintiff posted a sufficient bond. The defendant could seek immediately dissolution of the writ, which the court had to order unless the plaintiff "proves the grounds upon which the writ was issued" at an immediate hearing requested by the defendant. If the writ was dissolved, the court was authorized, immediately, on the motion to dissolve, to award the debtor damages, including attorney fees for wrongful issuance of the writ, and thereafter the case was to proceed as if no writ was issued.

The Supreme Court receded from its broad holding in *Fuentes, supra,* that a hearing prior to seizure was essential to the constitutionality of a statute authorizing prejudgment seizure. However, the Supreme Court stressed the points of the Louisiana law that made the statute constitutional: (1) a strong showing by the plaintiff before the court could issue the prejudgment writ; (2) the opportunity of the defendant to obtain an immediate hearing on an application to dissolve the writ; and, (3) the requirement that the writ be dissolved and

damages for wrongful issue be awarded immediately to the defendant if the plaintiff failed to prove at that hearing the grounds upon which the prejudgment writ was issued. *Mitchell, supra,* at 600.

The Florida prejudgment writ of replevin is similar and was fashioned after the Louisiana law was found constitutional in *Mitchell.*

In a reasoned constitutional opinion in *McMurrain* the First District held (at 1032-33) that "under the holdings of *Fuentes* and *Mitchell,* Florida's prejudgment replevin procedure would be unconstitutional in the absence of these provisions".

The court continued at 1033:

> Under the holdings of these cases, [*Fuentes* and *Mitchel*] the immediate post-seizure hearing on a motion to dissolve the prejudgment writ is the point at which the plaintiff is "put to his proof" of his right to possession of the property pending trial. Upon the plaintiff's failure to prove such right, the trial court is mandated to dissolve the prejudgment writ, order the wrongfully seized property returned to the defendant, and award damages, if any have been incurred, to the defendant. The prejudgment replevin proceeding is at this point, concluded for all practical purposes. If the complaint contains counts for ordinary replevin and other causes of action, as does the complaint in this case, those claims obviously remain pending trial. **However the continuing pendency of those claims does not serve as a**

> **defense to the defendant's right to relief immediately upon the dissolution of a wrongfully issued prejudgment writ of replevin.....**
>
> **We agree with McMurrain [petitioner] that unless he is given immediate relief without regard to the pending cause of action, the mandate of this court will be meaningless and substantially ineffective.** (emphasis supplied)

In *Trans Atlantic Distributors v. Whitland* 671 So. 2d (Fla 5th DCA 1996) the issue was whether attorney fees and costs were immediately awardable to the defendant under F.S. s 78.20 upon the dissolution of wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6).

The Fifth District held, contrary to the holding of the First District in *McMurrain,* that damages were not immediately awardable under F.S. s. 78.20 upon the dissolution of a wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6) but had to be postponed until the defendant prevailed, if at all, in the main replevin action. *Trans Atlantic Distributors* acknowledged conflict with *McMurrain*, citing a decision of this court, *Gimbel v. International Mailing and Printing,* 506 So. 2d 1081 (Fla. 4th DCA 1987) as supporting the *Trans Atlantic* interpretation of F.S. s. 78.20

In *McMurrain* the court held that, under the holdings of *Fuentes* and *Mitchell,* construing F.S. s. 78.21, (which was the relevant statute on its fact) as not providing for an immediate right to damages upon the dissolution of a wrongfully issued prejudgment writ of replevin under s. 78.068(6)

would render section 78.21 unconstitutional, as applied—a violation the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Similarly, in *Trans Atlantic Distributors*, the court's construing F.S. s. 78.20 as not providing for an immediate right to damages upon the dissolution of a wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6) renders F.S. s. 78.20 unconstitutional, as applied—a violation the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Therefore, *Trans Atlantic Distributors* is unconstitutional.

A fortiori, the trial court's January 31, 2008 *Order Granting Plaintiff's Motion to Preclude Evidence of Damages Absent Fulfillment of Conditions Precedent* (A-1) construing F.S. s. 78.20 as not providing Petitioner an immediate right to damages upon the dissolution of the wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6) renders F.S. s. 78.20 unconstitutional, as applied—a violation the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Therefore, the trial court's January 31, 2008 *Order Granting Plaintiff's Motion to Preclude Evidence of Damage* (A-1) is unconstitutional.

Gimbel was not about a defendant's immediate right to damages under F.S. s. 78.20 upon the dissolution of a wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6); in *Gimbel* the constitutional requirement of a defendant's immediate right to damages under F.S. s. 78.20 upon the dissolution of a wrongfully issued prejudgment writ of replevin under F.S. s. 78.068(6) was not before the Court. *Gimbel* does not support

the decision in *Trans Atlantic Distributors; Gimbel,* on its facts, distinguishable and is not in conflict with *McMurrain.*

The Second District, without citing *McMurrain,* in *Jalaskari v. Bank of Nova Scotia,* 802 So. 2d 1220 (Fla. 2nd DCA 2002) supports the *McMurrain* constitutionally correct interpretation of F.S. s. 78.20. Since the Florida Supreme Court denied review in *McMurrain* 592 So. 2nd 680 (Fla. 1991) the Supreme Court supports the constitutionally correct interpretation of F.S. s. 78.20.

CONCLUSION

The Court in *McMurrain, supra,* held as follows at 1034:

> The writ of certiorari is granted and the order denying McMurrain relief on his motion for damages is quashed with directions that the trial court proceed as expeditiously as possible to assess the amount of McMurrain [petitioner] damages and not postpone that decision until Fason's [respondent] other pending causes of action are adjudicated on the merits.

Similarly, Petitioner requests that this court grant this Writ of Certiorari, quash the January 31, 2008 *Order Granting Plaintiff's Motion to Preclude Evidence of Damages Absent Fulfillment of Conditions Precedent* (A-1) with directions that the trial court proceed as expeditiously as possible to assess the amount of Petitioner's damages and not postpone that decision until Respondent's other pending causes of action are adjudicated on the merits.

As set out in *McMurrain, supra,* at 1034 and *Mitchell, supra,* at 606 n. 8, damages include attorney fees and costs, damages to compensate Petitioner for the period during which he was deprived of the use of the property; but, damages are not restricted to pecuniary loss. Damages may also encompass injury to social standing or reputation as well as humiliation and mortification.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail to Mark Bernet, Esq., 1505 N. Florida Ave., Tampa, FL 33601; and Edward A. Marod, Esq., 400 South Australian Ave., Suite 750, West Palm Beach, FL 33402 this 3rd day of March, 2008

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the font requirements of Fla. R. App. P. 9.100(l) and Fla. R. App. P. 9.210(a) (2) in that the font size is Times New Roman 14 point.

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APPENDIX G

IN THE SUPREME COURT OF FLORIDA

JUSSI K. KIVISTO — Case No. SC08-856

v. — 4 DCA Case No. 08-882

L.T. 502007CA 006713

XXXX MB

Petitioner

GMAC LLC f/k/a GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondent

_____/

PETITIONER'S AMENDED BRIEF ON JURISDICTION

STATEMENT OF CASE AND FACTS

This is an appeal of a 4/16/08 decision of the District Court of Appeal, 4th District, in *Kivisto*, v. *GMAC LLC* 978 So. 2d (4th DCA 2008) denying Petitioner's Petition for Writ of Certiorari. (A-1) A timely notice invoking this Court's discretionary jurisdiction was filed.

> The 4th DCA decision, *sub judice,* holds: We agree that this order is reviewable by certiorari, based upon *McMurrain,* but we disagree with the holding on the merits on *McMurrain* and agree with *Trans Atlantic.* We certify direct conflict with *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991).

Pursuant a pre-judgment writ of replevin issued on 5/29/07 by the trial court, *ex parte,* Respondent, on 6/26/07, seized Petitioner's vehicle

from Petitioner's driveway in a gated community. On 8/3/07 the trial Court dissolved the pre-judgment writ of replevin (A-4 to Petition for Cert) and ordered Respondent to return the vehicle to Petitioner, reserving the claim for damages, attorney fees and cost for a hearing to be scheduled. Respondent returned to vehicle to Petitioner on or about 8/22/07.

On 9/27/07 Petitioner, pursuant to the holdings in *Mitchell v. W.T. Grant,* 416 U.S. 600 (1974) and *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991) *rev. denied,* 592 So. 2nd 680 (Fla. 1991) filed his motion for damages, attorneys' fees and cost. (A-7 to Petition for Cert)

By granting on 1/31/08 Respondent's *Motion to Preclude Evidence of Damages Absent Fulfillment of Conditions Precedent* and citing *Trans Atlantic Distributors v. Whiland* 671 So. 2d 883 (Fla. 5th DCA 1996), (A-1 and A-9 to Petition for Cert) the trial court held that Petitioner was not immediately entitled to damages (and, hearing on damages) under § 78.20 Fla. Stat. (2007) upon the dissolving, pursuant to § 78.068(6) Fla. Stat. (2007), of the wrongfully issued writ of prejudgment replevin but an award of damages (and, hearing on damages) had to be postponed until the Petitioner prevailed, if at all, in the main replevin action.

Petitioner timely filed a Petition for Certiorari with 4th DCA arguing that under the principles *Mitchell v. W.T. Grant,* 416 U.S. 600 (1974) and *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991) *rev. denied,* 592 So. 2nd 680 (Fla. 1991) trial court's holding that Petitioner was not immediately entitled to damages under § 78.20 Fla. Stat. (2007) upon the dissolving of a wrongfully issued writ of prejudgment replevin violated the Due Process

Clause of the 14th Amendment to the U.S. Constitution (and Article 1, Section 9 of the Florida Constitution). Petitioner argued that § 78.20 Fla. Stat. (2007), as applied and construed by trial court, was unconstitutional--violated the Due Process Clause of the 14th Amendment (and Article 1, Section 9 of the Florida Constitution) by not comporting with the constitutional due process requirements of *Fuentes v. Shevin,* 407 U.S. 67 (1972) and *Mitchell v. W.T. Grant,* 416 U.S. 600 (1974).

The 4th DCA denied the Petition for Certiorari certifying direct conflict with *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991).

SUMMARY OF ARGUMENT

The decision, *sub judice,* certifies direct conflict with a decision of another district court of appeal. Consequently this Court has jurisdiction to resolve the conflict and to make uniform the law throughout the State.

Constitutional due process in prejudgment replevin is a matter of great public importance. Constitutional rights need to be uniform through out the districts in Florida.

ARGUMENT

A. BECAUSE THE DECISION, SUB JUDICE, CERTIFIES DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT, DENYING PETITIONER'S PETITION FOR CERTIORARI

Article V, §3(b)(4) of the Florida Constitution vests this Court with jurisdiction to "review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." Accord *Fla. R. App. P.* 9.030(a)(2)(A)(vi).

The 4th District Court of Appeal decision, *sub judice,* holds:

> In *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991), the first district granted a petition for certiorari under similar circumstances, holding that the damages were due immediately upon the dissolving of the writ. Prior to *McMurrain*, this court had construed section 78.20, Florida Statutes (2007), upon which this issue turns, in a manner contrary to *McMurrain. Gimbel v. Int'l Mailing and Printing Co,* 506 So. 2d 1081 (Fla. 4th DCA 1987). After *McMurrain* was decided the fifth district, in *Trans Atlantic Distributors, L.P. v. Whiland Co., S.A.* 671 So. 2d (Fla. 5th DCA 1996) adopted our holding in *Gimbel* and disagreed with *McMurrain.*
>
> We agree that this order is reviewable by certiorari, based upon *McMurrain,* but we disagree with the holding on the merits on *McMurrain* and agree with *Trans Atlantic.* We **certify direct conflict** with *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991). (emphasis supplied)

In *Trans Atlantic, supra,* the 5th DCA held at 884:

> In agreeing with the Fourth District's interpretation of section 78.20, we **acknowledge** conflict with *McMurrain v. Fason,* 584 So. 2nd 1027 (Fla. 1st DCA 1991) *rev. denied,* 592 So. 2nd 680 (Fla. 1991) (emphasis supplied)

Certification of a direct conflict provides this Court with jurisdiction *per se. State v. Vickery,* 961 So.2d 309, 312 (Fla. 2007); and, gives even if this court determines there is no direct conflict. *Clark v. State,* 783 So.2d 967 (Fla. 2001). The 4th DCA **certifies** direct conflict with *McMurrain;* 5th DCA, on facts on all fours with this case, acknowledges conflict. It follows that there is a direct conflict among the districts. Certified direct conflict provides jurisdiction as a matter of Florida constitutional law.

In *Nielson v. City of Sarasota,* 117 So. 2d 731, 734 (Fla. 1960), this court discussed "conflict jurisdiction" stating that "[it] is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal." See also *Kaigler v. State,* 944 So. 2d 340 3Fla. 2006); *J.I.S. v. State,* 930 So. 2d 587 (Fla. 2006); *Kincaid v. World Insurance Co.,* 157 So. 2d 517, 518 (Fla. 1963):

The direct conflict set out in the decision, *sub judice,* is as follows:

In *McMurrain,* the first district held that the defendant in a replevin action is immediately entitled to damages upon the dissolving of a wrongfully issued writ of prejudgment replevin; in *Trans Atlantic* the 5th DCA, on facts on all fours

with case, *sub judice*, acknowledging conflict with *McMurrain*, held that such defendant is not immediately entitled to damages upon the dissolving of a wrongfully issued writ of prejudgment replevin: an award of damages to such defendant has to be postponed until the defendant prevails, if at all, in the main replevin action. In the decision *sub judice*, the 4th DCA, **certifying direct conflict** with *McMurrain*, disagreed with the holding on the merits in *McMurrain* and agreed with *Trans Atlantic, viz.*, the defendant in a replevin is not immediately entitled to damages upon the dissolving of a wrongfully issued writ of prejudgment replevin: an award of damages to such defendant has to be postponed until the defendant prevails, if at all, in the main replevin action.

The *McMurrain* holding with which both the 4th and 5th DCA disagreed on the merits reads as follows at 1033 and 1034:

> We again emphasize that under the holdings of *Fuentes* and *Mitchell*, Florida's prejudgement replevin procedure would be unconstitutional in the absence of these protections. [protections set out in *Mitchell* as well as by this Court in *Gazil, Inc. v. Super Food Service*, 356 So. 2d 312 (Fla. 1978)] Under the holdings of these cases, the immediate post-seizure hearing on a motion to dissolve the prejudgment writ is the point at which the plaintiff is "put to his proof" of his right to possession of the property pending trial. Upon the plaintiff's failure to prove such right, the trial court is mandated to dissolve the

prejudgment writ, order the wrongfully seized property returned to the defendant, **and award damages, if any have been incurred, to the defendant.** The prejudgment replevin proceeding is at this point, concluded for all practical purposes. If the complaint contains counts for ordinary replevin and other causes of action, as does the complaint in this case, those claims obviously remain pending trial. **However the continuing pendency of those claims does not serve as a defense to the defendant's right to relief immediately upon the dissolution of a wrongfully issued prejudgment writ of replevin.** .....

We agree with [petitioner] that unless he is given immediate relief without regard to the pending cause of action, the mandate of this court will be meaningless and substantially ineffective. .....

The writ of certiorari is granted and the order denying [petitioner] relief on his motion for damages is quashed with directions that the trial court **proceed as expeditiously as possible to assess the amount of [petitioner's] damages and not postpone that decision until [respondent's] other pending causes of action are adjudicated on the merits.** (emphasis supplied)

Accordingly, since the 4th DCA decision, *sub judice,* is certified to be in direct conflict with *McMurrain,* it is incontrovertible that this Court has jurisdiction to review the decision which Petitioner seeks review.

B. THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COUROF APPEAL OF FLORIDA, FOURTH DISTRICT, DENYING PETITIONER'S PETITION FOR CERTIORARI.

This Court has held that a district court's certification of a direct conflict with a decision from another district is sufficient to provide not only jurisdiction in this Court, but a reason for the Court to exercise that jurisdiction. *Clark v. State,* 783 So. 2d 967 (Fla. 2001)—"...the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court." See Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida,* 29 Nova L. Rev. 431, 530 (2005), cited with approval in *Clark, supra,* at 969.

In *Mitchell, supra,* both the Supreme Court of Louisiana and U.S. Supreme Court accepted jurisdiction for interlocutory review of a due process challenge to Louisiana's prejudgment sequestration procedures.

Since the difference between the courts relates to their ability to protect fundamental constitutional due process rights of citizens, this Court should accept jurisdiction and resolve the conflict.

Petitioner submits that Petitioner's due process constitutional challenge to the decision, *sub*

judice, is of such significance that this Court should exercise its discretion and accept jurisdiction to resolve the conflict. That is, § 78.20 Fla. Stat. (2007) as construed by the fourth district in this case violates the due process clause of the 14th Amendment to the United States Constitution and of the of the Florida Constitution.

First National Bank of Santa Fe v. Southwest Yacht 684 P.2d 517 (N.M. 1984) illustrates the significance of Petitioner's constitutional challenge. In *First* defendant sought damages for wrongful replevin.

The Supreme Court of New Mexico noted that in 1975 a statutory remedy had been added to meet the constitutional due process requirements of *Mitchell:* upon the dissolving of a prejudgment writ of replevin the defendant was entitled to attorney's fees and double damages for the loss of use of the property.

The court noted at 522 as follows:

> Additionally the history [of added statutory remedy] indicates that it was enacted to prevent a defendant from being forced to pay his own attorney fees to quash a writ issued based on a defective affidavit. Such payment of fees would subvert the due process requirements establish in *Mitchell v. W.T. Grant Co.*

Petitioner's constitutional due process challenge to the decision, *sub judice,* makes the same point. If the defendant in a replevin action is not immediately entitled to damages upon the dissolving of a wrongfully issued writ of prejudgment replevin but an award of damages to

such defendant has to be postponed until the defendant prevails, if at all, in the main replevin action, then the due process requirements of *Mitchell* are subverted. If a statute subverts the due process requirements of *Mitchell* then that statute is either unconstitutional on its face or as construed.

Since *McMurrain* construed § 78.20 Fla. Stat. (2007) constitutionally it follows that § 78.20 Fla. Stat. (2007) as construed by the 4th DCA in the case, *sub judice,* is unconstitutional.

Significant here is that in the Louisiana sequestration statute in *Mitchell* the defendant was entitled to an immediate hearing and damages upon the dissolving of wrongfully issued writ.

In *First National, supra,* the court referred to this Court's decision in *Gazil v. Super Food Service* 356 So. 2d 312, 313 (Fla. 1978) which established the minimum constitutional requirements required under *Mitchell,* emphasizing that one of the requirements is the right to an immediate hearing on possession. *McMurrain I, McMurrain v. Fason* 573 So.2d 915, 919 n. 4 (Fla. 1st DCA 1990) also refers to *Gazil.* A right to a hearing without the right to damages is constitutionally hollow.

This Court should exercise its jurisdiction to address the important constitutional due process argument advanced by Petitioner: in order to pass constitutional mustard under *Mitchell* § 78.20 Fla. Stat. (2007) must be construed as requiring that damages (as set out in *Mitchell* at 606, n. 8) be immediately awardable upon the dissolving, under § 78.068(6) Fla. Stat. (2007), of a wrongfully issued writ of prejudgment replevin.

CONCLUSION

Under Fla. R. App. P. 9.030(a)(2)(A)(vi) this Court should accept jurisdiction to review on its merits the 4th DCA decision, *sub judice*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail to Mark Bernet, Esq., 1505 N. Florida Ave., Tampa, FL 33601; and Edward A. Marod, Esq., 400 South Australian Ave., Suite 750, West Palm Beach, FL 33402 this 26th day of June, 2008

CERTIFICATES OF COMPLIANCE

I hereby certify that the foregoing complies with the font requirements of Fla. R. App. P. 9.100(l) and Fla. R. App. P. 9.210(a) (2) in that the font size is Times New Roman 14 point. I hereby certify that Administrative Order AO04-84 has been complied with in that the foregoing has been electronically submitted this 26th day of June, 2008.

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